

## NEW PUBLICATIONS.

THE AMERICAN LAW REVIEW. October. Little, Brown, & Co.

One of the leading papers in this number, discussing the question of perpetual copyright, and of the nature of literary property, will doubtless attract the attention of authors and publishers, as well as jurists, by the clearness of its historical details, and its logical vigor of argument. The writer shows that down to the time of Queen Anne, authors had enjoyed a perpetual property in their works under the common law. During her reign (1710), an act was passed by Parliament securing to authors the sole right of publishing their intellectual productions for a specified period. The perpetual right, however, was undisturbed for half a century after this enactment, and in 1769 it received the solemn sanction of the Court of King's Bench. But five years later (1774), this judgment was swept away by the House of Lords, who proclaimed that the perpetuity of literary property had been destroyed by the statute of Anne, and that authors had no copyright in their works except under that act. This has now been the law of England for a century, was copied by the United States government in 1790, and has since ruled Congress and the courts. Although it has been denounced as bad law by the ablest jurists of England and America, it has been defended by others, the former maintaining that copyright is a natural right, guaranteed by the common law, and not abridged by statute, while the latter assert that it is an artificial right, created and controlled by the legislature. The writer of the article proceeds to consider the foundation of property in general, and its application to intellectual production. In common with the highest authorities on natural law, he places the origin of property in possession, which he regards as identical with first possession. The chief source of first possession is creation. Hence the origin of the right to property is found in labor. Labor is implied in occupancy. Ownership is created by production, and the producer becomes the owner. This principle is general, and covers all productions. It cannot be applied to the produce of one kind of labor, and withheld from that of another. It matters not whether the labor be of the body or the mind. The yield of both comes under the same grand principle of property, which recognizes no distinction between the poet and the peasant in the ownership of their productions. There is no argument for the right of property in the fruits of bodily labor, which does not apply with equal force to the right of property in the fruits of intellectual labor. No vital qualities can be assigned to one which are not equally inherent in the other. Neither in its origin nor in its essential qualities is literary property of a peculiar character. It is simply a branch of general property. It is acquired by labor, succession, gift, purchase. It is transmitted by sale, donation, and bequest. It may be lost by abandonment, injured, trespassed upon, stolen. It may be the subject of contract, bargain, trade, fraud, and may be borrowed and lent, mortgaged and pawned. The only distinction between property in the fruits of intellectual and of manual labor, is that the one is without material substance, while the other is material and corporeal. The property of the author is not in the material which preserves his work, but in the conceptions which constitute an intellectual creation. The property is what is conveyed by the words of the manuscript, or the printed page, and not in the paper or parchment; in the beauty expressed by colors and not in the canvas; in the life breathed into the statue and not in the marble or bronze. It is an intangible creation of the mind, fixed in form and communicated to others by language. Incorporated itself, it is attached to the corporeal. But material substance is not an essential attribute of property. No doubt, nothing must be capable of identification in order to be the subject of exclusive ownership. But when its identity can be determined, it makes no difference whether it be corporeal or incorporeal. Now the identity of intellectual productions is no less marked than that of manual productions. It is more difficult to draw the line of property between the literary works of Tennyson and of Emerson than between their bonds and lands. So complete, indeed, is the identity of literary property that the productions of genius can be classed, with reference to their respective authors, with no less accuracy than the architect assigns a capital or a cathedral to its order and period, or a naturalist determines an animal from a single bone. If the lost books of Livy were found without any external clue to their authorship, there would be those who would quickly recognize in them the prophetic marks of the great historian. Still more remarkable is the identity of a musical composition. A master will complete a great musical creation without putting a note on paper. It is a work without material form in the realm of imagination; but so marked is its individuality that a musical ear will reproduce it without the aid of written notes. "Time's effacing fingers" do not destroy what is best in literature. While many of the Roman monuments of brass and stone can no longer be distinguished, the intellectual monuments have been preserved intact for twenty centuries. The greatest creation of ancient genius, the Iliad, has not only kept its identity for nearly thirty centuries, but, according to famous Greek scholars, it was recited from memory at the Grecian festivals for ages before it was "impressed in written characters." The paper then goes on to show that if before publication an author has unconditional property in his works, the right is not lost by the fact of publication. If this species of property is thus lost to the original owner, it must be upon the principle of abandonment or contract. But it is conceded by all writers on natural law, there can be no abandonment of property without the consent of the owner. Hence abandonment implies intention on the part of the owner. But no such intention is admitted by the author. He never ceases to assert his rights of ownership. In publishing his book, he maintains a vigilant watch over his property, and loudly protests against its spoliation. The theory of abandonment, then, must be rejected. Nor is it the theory of compact between the author and the public any more tenable. The author gives to the reader the intellectual uses contained in a book. But he reserves to himself the exclusive ownership of the intellectual property. The right to multiply copies of the book is no part of the contract. This right is exclusively reserved to the author by the copyright notice. It may be worth a hundred thousand dollars, while the amount paid for the book is but the one-hundred-thousandth part of that sum. No consideration is paid for the copyright. But it is a principle of justice that the written law, that without the owner's consent property can only be acquired by a valid consideration. Now assuming that literary property, both before and after publication, is founded upon the same principles as other property, it follows that it must be governed by the same fundamental rules and protected by the same legal safeguards that are thrown around all property. Whatever violates the sanctity of one violates the sanctity of the other. Now one of the chief functions of government is to preserve the sanctity of property. But the legislation which reduces the ownership of literary property from perpetuity to a term of years does not proceed according to the recognized principles of property. There is no difference of principle between a statute which requires an author to surrender his works to the public at a prescribed time, and one which would compel the owner of the Mammoth Cave, after a term of years, to admit visitors to its subterranean wonders without charge. The law which puts an arbitrary terminus upon the ownership of literary property is the same in principle with one that would limit the farmer's right to his orchards and grain fields. The application of this principle to material possessions would raise every Saxon hand in rebellion. Yet for a century the same principle has been applied with impunity to a species of property no less valuable, no less inviolable. To-day, the English nation says to its poet laureate: "Queen Mary shall be yours for forty-four years, and no longer," but if the same genius had made a beer-barrel, his title to it would run against all time. It has never been shown that authors are not entitled to the same protection for the fruits of their intellectual industry that is given to the produce of bodily labor, not as a matter of favor but of justice. These principles were recognized by the law of England until 1774, but for a century they have not been sanctioned by the courts of England or America. Not, however, that they have been rejected by the unanimous voice of the most eminent jurists. There is not a legal judgment in England or America against the perpetuity of literary property which does not rest on the divided opinion of the judges. In the decision of the House of Lords, against the rights of authors (1774), eight of the twelve judges, including Lord Mansfield, declared that copyright was a natural right, and not lost by publication. Six of the twelve were of opinion that such right had not been abridged by the statute of Queen Anne. In 1851, Lord Campbell, delivering the opinion of the full bench of the Court of Exchequer, pronounced in favor of the common-law right of authors. In 1854, upon the discussion concerning literary property in the House of Lords, Mr. Justice Earle delivered an elaborate argument in support of the doctrine of Lord Mansfield, and Mr. Justice Coleridge emphatically expressed the same opinion, referring to the almost supreme authority of Lord Mansfield. The question of the United States, in 1834, it ruled that an author had no proprietary rights in his works except those conferred by the copyright statutes. But this judgment was

not unanimous. Two of the six judges dissented, maintaining that literary property was founded in the common law, and that its perpetuity had not been abridged by statute. In treating the subject, which is of no less interest to literary men than to lawyers, the writer Mr. E. S. Drane, has exhibited a wealth and exactness of learning, a terseness of statement, and a modicum of expression, of which there are but comparatively infrequent examples in the literature of the profession. Another paper of a remarkable character in this number, "The History of a Title," is a chapter from the romance of conveyancing, showing the disposition of four successive occupants of a valuable piece of real estate in Boston in the course of less than fifteen years, through a singular defect of title in each case, and after all, by a fresh search and discovery, the property reverting to the original owner, who had been left out in the cold for several years, with ample opportunity to "ponder on the uncertainty of the law and the mutability of human affairs."

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